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No. 84-1581

In The

Supreme Court of the United States

October Term, 1984

SEALY, INCORPORATED, ET AL.,

Petitioners,

v.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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15 pp

STATEMENTS PURSUANT TO RULES 21.1(b) and 28.1

Respondents Ohio-Sealy Mattress Manufacturing Company, Sealy Mattress Company of Houston, Sealy Mattress Company of Fort Worth, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, and Sealy Mattress Company of Georgia, and petitioners Morris A. Kaplan, Sealy Mattress Company of Illinois, William H. Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Company, Morton H. Yulman, Sealy of Eastern New York, Inc., Sealy of Minnesota, Inc., T. C. Englehardt, Jr., Fred G. Hodges Bedding Company, (a/k/a Sealy Mattress Company of Reading, PA.), Joseph R. Rudick, Maryland Bedding Company, Howard G. Haas, Sealy Spring Corporation, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., were parties to the proceedings in the Court of Appeals.

The Ohio-Sealy Mattress Manufacturing Company was restructured on July 11, 1984 and respondents became wholly-owned subsidiaries of The Ohio Mattress Company.

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STATEMENT OF THE CASE

In 1967 the Court held that Sealy's system of exclusive territories violated the antitrust laws. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Shortly after this Court's decision Sealy's licensee directors developed, in Sealy's own words, "ways and means of getting around the Supreme Court ruling in such a way as to be able to

retain the territorialization." Those "ways and means" included a monetary incentive encouraging each Sealy licensee to sell only in its own territory, a surcharge on sales outside a licensee's territory, a further "product service repair" charge on such sales, a plant location clause, exclusive manufacturing territories, and a right of first refusal. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 745 F.2d 441 (7th Cir. 1984). (A-3-4)*

In 1971 Ohio sued Sealy (*Ohio I*) alleging that this combination of restraints had the purpose and effect of maintaining the exclusive territories which the Court had held unlawful. In 1975 a jury found in Ohio's favor and awarded damages "to the time of trial." Sealy made no voluntary change as a result of this verdict and in 1977 the district court denied equitable relief. In 1978 the Court of Appeals affirmed the jury verdict and reversed the denial of equitable relief. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979). In 1981 the district court granted most of the equitable relief requested but denied Ohio's request for damages suffered during the six-year period between the jury verdict and the granting of equitable relief. In 1982 the Court of Appeals affirmed, holding that Ohio should seek post-verdict damages in a separate action. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 669 F.2d 490 (7th Cir. 1982).

Meanwhile, in 1976, Ohio had already filed such a separate action, the instant case (*Ohio II*). Ohio alleged

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* "A" references are to Appendix A of Sealy's Petition.

that Sealy had continued to maintain its unlawful combination of restraints and sought damages for the period following the 1975 jury verdict. In 1980 the district court held that Ohio should have sought those post-verdict damages from pre-verdict conduct in the prior case (*Ohio I*). *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 90 F.R.D. 11, 15 (N.D. Ill. 1980). (B-8)* In 1984 the Court of Appeals reversed, holding that the accrual of future damages had been speculative at the time of the 1975 jury verdict. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 745 F.2d 441 (7th Cir. 1984).

> At the time Ohio asked the jury to assess damages in *Ohio I,* Ohio was entitled to believe that Sealy would in the future obey the nation's antitrust laws. That is, Ohio could proceed under the assumption that, in the event of a verdict in Ohio's favor, Sealy would open its territories to reasonable intrabrand competition from neighboring licensees. Judge Aspen was correct when he stated that at the time of trial Ohio could not have expected Sealy to hand the Philadelphia, Florida, and Pittsburgh licenses over to Ohio in the event the jury returned a verdict against Sealy. Judge Aspen, however, erred when he ignored all the other tricks, gambits, and ploys Sealy allegedly continued to use after April 1975 to seal off its territories from reasonable intra-brand competition.

Id. at 450. (A-14)

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* "B" references are to Appendix B of Sealy's Petition.

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REASONS FOR DENYING THE WRIT

I. Sealy's Petition Ignores The Court's Decision In Lawlor.

Sealy contends that the Court of Appeals' decision is in conflict with the principles of *res judicata*. Sealy ignores the fact, however, that the Court of Appeals' decision is consistent with, and was based on the Court's decision in *Lawlor v. National Screen Services Corp.*, 349 U.S. 322 (1955).

In *Lawlor*, plaintiffs filed an antitrust suit in 1942, seeking treble damages and injunctive relief. The complaint alleged that the defendants had conspired to monopolize the distribution of motion picture advertising materials. The suit was settled in 1943 and the trial court dismissed the suit with prejudice.

In 1949, plaintiffs filed another antitrust action. The complaint alleged that the settlement of the 1942 suit was merely a device to perpetuate defendants' conspiracy, and that the defendants had engaged in additional behavior aimed at destroying plaintiffs' business. Plaintiffs sought damages for injuries arising subsequent to the dismissal of the 1942 suit.

The defendants filed a motion to dismiss, claiming that the judgment in the 1942 action was *res judicata*. The district court granted the motion, and dismissed the action.

The Court of Appeals defined the issue before it as "whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942." *Lawlor v. National Screen Service Corp.*, 211 F.2d 934, 935 (3d Cir. 1954), *rev'd on other grounds*, 349 U.S. 322 (1955). The court determined that because

the two suits were based on "essentially the same course of wrongful conduct," they constitute the "same cause of action." Id. at 936. Accordingly, the court held that the 1949 suit was barred by the judgment dismissing the 1942 suit, and affirmed the district court's decision.

The Court granted certiorari and reversed, concluding that the 1942 and 1949 suits were not based on the same cause of action:

> That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct — for example, an abatable nuisance — may frequently give rise to more than a single cause of action.

349 U.S. at 327-28. The Court also noted that "[a]ntitrust violations are expressly made abatable." *Id.* at 328, n.13. The judgment in the 1942 action did not constitute a bar to the 1949 suit regardless of "whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort." *Id.* at 328.

In the instant action, the Court of Appeals held that Ohio could sue for post-verdict damages arising from pre-verdict conduct because the post-verdict damages were integrally tied to other post-verdict conduct, citing *Lawlor:*

> This is an unusual case in that Sealy's liability in 1975 for its wrongful acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and denial of a new plant location in Toledo depended directly upon Sealy's enforcement of other contract provisions that effectively sealed off Philadelphia, Florida, Pittsburgh, and the out-of-APR territory around Toledo from intrabrand competition. The post-verdict damages that Ohio now seeks are thus not, as Sealy would have us believe, "continuing damages for *old* and *now insulated,* illegal conduct." *Exhibitor's Poster Ex-*

> *change, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1319 (5th Cir. 1970) (emphasis by the Seventh Circuit). The post-verdict damages sought in *Ohio II* necessarily required for their accrual Sealy's alleged maintenance of the host of other devices that insured the APR's in question would remain enclaves untroubled by competition from Ohio. Ohio was not required to predict that these devices would remain in place following the 1975 verdict. A contrary conclusion on our part would in effect confer on defendants immunity from civil liability for their post-verdict maintenance of barriers around Philadelphia, Florida, Pittsburgh, and the out-of-APR territories surrounding Toledo. See *Lawlor, supra,* 349 U.S. at 329, 75 S. Ct. at 869.

Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d at 450. (A-17-18)

Sealy's petition ignores the *Lawlor* decision as well as the Court of Appeals' application of *Lawlor* to the instant case.

II. Sealy's Petition Ignores The Court Of Appeals' Application Of The Court's Holding In Zenith Radio Corp. v. Hazeltine Research, Inc.

The Court of Appeals' decision relies heavily upon the Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). In its petition for certiorari, Sealy pays lip service to *Zenith,* but completely ignores the Court of Appeals' application of that case to the instant action.

In *Zenith,* the Court stated the basic principle that when a cause of action accrues, a plaintiff is entitled to sue not only for past damages, but for future damages as well:

> [E]ach separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.

Id. at 338-39. This principle was also recognized by the Court of Appeals in the instant action 745 F.2d at 448 (A-12), and similar dicta was cited by Sealy (Petition, p. 7). The Court further stated, however, that a party is not required to sue for future damages when such damages are unprovable:

> [I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable *if the fact of their accrual is speculative or their amount and nature unprovable.*

Id. at 339 (emphasis added). The Court of Appeals applied this language:

> The accrual of future damages resulting from the acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and the denial of a Toledo plant *was speculative at the time of the 1975 jury verdict.*

745 F.2d at 448-49. (A-17) (emphasis added).

The principles of *res judicata* as articulated in *Zenith* and applied by the Court of Appeals in the instant action are ignored by Sealy. Because the Court of Appeal's decision is consistent with *Zenith,* the petition for certiorari should be denied.

III. The Court Below Correctly Applied The Doctrine Of Res Judicata.

When a plaintiff is harmed by a wrong which is of a continuing nature, the doctrine of *res judicata* does not preclude that party from suing once for damages incurred to the time of trial, and then suing again for subsequent damages if the defendant fails to cure the wrong. According to the *Restatement (Second) Judgments:*

> For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit...

§ 26(e), p. 234 (1982).

This principle, that successive actions may be brought for "continuing" wrongs, is well founded in the doctrine of nuisance law. A plaintiff is entitled to bring successive actions when a defendant fails to terminate an abatable nuisance. *See e.g., Rebel v. Big Tarkio Drainage District,* 602 S.W.2d 787, 792 (Mo. App. 1980); *Bartlett v. Grasselli Chemical Co.,* 92 W.Va. 445, 115 S.E. 451, 453 (1922); *Conestee Mills v. City of Greenville,* 160 S.C. 10, 158 S.E. 113, 116 (1931); *Hollenbeck v. City of Marion,* 116 Iowa 69, 89 N.W. 210, 212 (1902); *Spaulding v. Cameron,* 38 Cal. 2d 265, 268, 239 P.2d 625, 628 (1952); *Reynolds Metals Co. v. Wand,* 308 F.2d 504, 509-10 (9th Cir. 1962); *Restatement of Torts 2d,* § 930 (1977); *McCormick on Damages,* § 127, p. 511 (1935); and Dobbs, *Handbook on the Law of Remedies,* § 5.4, pp. 335-37 (1973).

Indeed, courts have held that it is reversible error to award future damages arising from an abatable nuisance

without first giving the wrongdoer an opportunity to discontinue or remedy the nuisance. *See e.g., Uline v. New York Central & H.R.R.* Co., 101 N.Y. 98, 4 N.E. 536, 552 (1886); *Bowers v. Mississippi & R.R. Boom Co.*, 78 Minn. 398, 81 N.W. 208, 209 (1899); *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N.E. 693, 696 (1892); *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N.E. 229, 230 (1891).

The principle that a party may bring successive actions for a continuing wrong has direct application to antitrust actions. As discussed *supra*, the Court specifically stated in *Lawlor* that "an abatable nuisance . . . may frequently give rise to more than a single cause of action," and that "[a]ntitrust violations are expressly made abatable." 349 U.S. at 327-328, n.13.

In the instant action, the Court of Appeals recognized that Ohio had no way of knowing at the time of the jury trial in *Ohio I* that Sealy would fail to abate its anticompetitive conduct:

> Ohio was perfectly correct to proceed under the assumption that Sealy would discontinue those tactics following an award in Ohio's favor that indicated the jury necessarily found a horizontal division of markets. It would have been absurd for Ohio to argue to the jury in 1975 that it would continue to feel antitrust injury from Sealy's acquisitions and denial of a Toledo plant location well into the future. That Sealy would not dismantle its barriers to reasonable intrabrand competition following a verdict for Ohio was highly speculative, and Ohio accordingly cannot be barred from bringing its current damages action.

745 F.2d at 450. (A-17)

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CONCLUSION

Sealy's petition ignores the principles of *res judicata* as applied by the Court of Appeals. Because the Court of Appeals' decision is entirely consistent with decisions of the Court applying principles of *res judicata,* the petition should be denied.

Respectfully submitted,

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